
IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

WISCONSIN PUBLIC INTERVENOR,
and TOWN OF CASEY,

Petitioners,

v.

RALPH MORTIER and WISCONSIN FORESTRY/
RIGHTS-OF-WAY/TURF COALITION,

Respondents.

On Writ of Certiorari to the Wisconsin Supreme Court

BRIEF AMICUS CURIAE
on behalf of
**NATIONAL PEST CONTROL ASSOCIATION,
NATIONAL AGRICULTURAL CHEMICALS
ASSOCIATION, AGRICULTURAL COMMODITY
COALITION, EDISON ELECTRIC INSTITUTE,
and CHEMICAL MANUFACTURERS
ASSOCIATION**

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Petitioners and respondents having consented, the National Pest Control Association, National Agricultural Chemicals Association, Agricultural Commodity Coalition, Edison Electric Institute, and Chemical Manufacturers Association are submitting this brief as *amici curiae*. The brief supports the position of respondents that the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), 7 U.S.C. §§ 136-136y (1988), preempts regulation of pesticides by local units of government.

INTEREST OF THE AMICI

The *amici curiae* are national trade associations whose members protect the public from the health hazards and economic harm of pests.¹ Their members are manufacturers, commercial applicators, and consumers of structural, agricultural, horticultural, right-of-way, and other pesticides, the use of which is more extensively regulated by the federal and state governments than any other type of chemical.

The *amici* and their members support the comprehensive, highly competent, well-coordinated system of federal and supplementary state regulation which Congress established through enactment of FIFRA. They are filing this brief to explain why the integrity and utility, indeed the very purpose, of that system would be destroyed if the Court were to accept petitioners' invitation to rewrite FIFRA by allowing each of the 83,200 local

¹ The National Pest Control Association represents over 10,000 companies engaged in residential, institutional, and industrial pest control, and thirty-seven affiliated state pest control associations, including the Pest Control Operators of California and the Florida Pest Control Association. The National Agricultural Chemicals Association is comprised of the companies that manufacture, formulate and distribute virtually all of the agricultural crop protection chemicals and horticultural pesticides used in the United States. The Agricultural Commodity Coalition consists of the National Cotton Council of America, the National Corn Growers Association, the American Soybean Association, and the National Association of Wheat Growers, whose members depend upon cost-effective pest control for efficient crop production. The Edison Electric Institute represents virtually all investor-owned electric utility companies, which rely on pesticides in a variety of operations such as maintaining and controlling plant growth along transmission line rights-of-way and preserving wood utility poles. The Chemical Manufacturers Association is the national association for industrial chemical producers, including its Biocides Panel, which represents the industrial biocides industry, encompassing preservatives and biocides used in manufacturing processes.

governments in the United States² to second-guess federal and state regulatory determinations by devising their own individual sets of requirements and restrictions on pesticide use.

Local regulation would render superfluous the sophisticated scientific reviews and painstaking risk-benefit analyses which the United States Environmental Protection Agency ("EPA") conducts at great expense for each pesticide, and which a State's pesticide agency can fine-tune if necessary. It would displace dispassionate federal and state regulators, and the scientists who assist them, with local politicians who have no pesticide expertise. Such local officials would be free to prohibit or interfere with essential pest control operations, despite the fact that EPA and their State's pesticide agency have determined that the pesticides involved can be used without unreasonable human or environmental risk.

The resulting jumble of overlapping, conflicting, confusing and unnecessary local ordinances would severely impair, if not make impossible, delivery of timely, cost-effective pest control. As a consequence, public health and safety, the environment, and the economy would suffer.

Congress did not intend such a result when it rewrote FIFRA in 1972 in order to transform the Act into a comprehensive regulatory statute. To ensure well-balanced regulation, Congress gave EPA pervasive authority to regulate pesticides in both interstate and intrastate commerce, and extended supplementary authority only to the States themselves. In so doing, Congress made a conscientious decision that FIFRA's goals would not be served by allowing local governments to regulate pesticides.

² United States Department of Commerce, Statistical Abstract of the United States 1990, at 271-72 (110th ed.). Local governments include not only counties, municipalities and townships (38,900), but also special regulatory districts (e.g., power, irrigation, housing) (29,500), and independent school districts (14,700), which have a governmental character and substantial autonomy. See *id.*

Neither the petitioners nor any of the *amici* which oppose preemption have discussed the deleterious effects of local regulation on the federal-state scheme, or the regulatory chaos that would result from reversal of *Mortier v. Town of Casey*. Local pesticide ordinances not only would proliferate, they would devour FIFRA's system of federal-state regulation and the protections that it affords the public, the environment, and industry. For this reason, the *amici* urge affirmance of the Wisconsin Supreme Court's decision that FIFRA preempts all regulation of pesticides below the state government level.

SUMMARY OF ARGUMENT

The issue in this case is whether tens of thousands of local governments in the United States should be allowed to regulate pesticides, or whether Congress' carefully drawn scheme of federal and supplementary state regulation preempts such local regulation.

Based on the well-established principles of federal preemption, which apply to local regulations as well as state laws, there are two fundamental reasons why FIFRA preempts local governments from regulating pesticides:

First, FIFRA is a comprehensive statute, granting EPA authority to regulate virtually every aspect of pesticide registration, labeling, and use. By legislating comprehensively, Congress occupied the field of pesticide regulation, thereby preempting all state and local police power over pesticides, except for the specific supplementary regulatory authority which Congress expressly ceded to the States in FIFRA § 24, 7 U.S.C. § 136v. Thus, Congress left no room for regulation of pesticides by units of government below the state level.

The decision of the Wisconsin Supreme Court, and the opinions of the only two federal appellate courts which have considered the issue, analyze FIFRA's language and legislative

history and conclude that congressional intent to preempt local regulation is clear. The fact that congressional committees debated and even temporarily disagreed on the question of local regulation confirms that Congress' ultimate decision to preclude local regulation was well considered and deliberate.

Despite the advocacy position being espoused by the Solicitor General, EPA's longstanding, published interpretation of the statute is that Congress did not extend pesticide regulatory authority to political subdivisions within a State. This view not only is correct, it is consistent with congressional testimony given by EPA on numerous occasions.

Moreover, Congress has refused to change the statute to authorize local regulation, even though it is aware that many local governments wish to regulate pesticides, and that courts and EPA have interpreted FIFRA as preempting all local regulation. Furthermore, the States should not be allowed to circumvent FIFRA and congressional intent by attempting to delegate their regulatory authority to local governments.

Second, local regulation also is preempted because it would interfere with accomplishment of Congress' objectives. Through enactment of FIFRA, Congress sought to establish a well-coordinated and comprehensive system of federal and supplementary state regulation. Local regulation would obstruct that goal by undermining EPA's and state pesticide agencies' carefully considered scientific and regulatory decisions, superseding them with a myriad of unnecessary, uncoordinated, politically motivated requirements and restrictions adopted by local governments which lack the requisite scientific expertise, financial resources and objectivity to regulate pesticides competently.

In addition, and equally important, local regulation would conflict with Congress' goal of making cost-effective pest control available to the public, agriculture, and industry. If local regulation suddenly were allowed, there would be a nationwide

chain reaction of multiple, overlapping, conflicting or inconsistent, and onerous local ordinances. Because most pest control companies, commercial agricultural and right-of-way applicators (commonly referred to as "custom applicators"), and aerial applicators are small businesses which must be able to operate in more than one local jurisdiction, such a regulatory quagmire would make it logistically and/or financially impossible for them to provide timely, affordable, and efficacious service. Not only would FIFRA's fundamental purposes be defeated, there also would be adverse public health, environmental and economic consequences.

ARGUMENT

FIFRA PREEMPTS ANY AND ALL LOCAL REGULATION OF PESTICIDES

I. Congress Intended To Occupy the Field of Pesticide Regulation

The *amici* agree with the Wisconsin Supreme Court, and with the Fourth and Sixth Circuits, that "it was the clearly manifested intent of the congress to preempt any regulation of pesticides by local units of government." *Mortier v. Town of Casey, Wisconsin*, 154 Wis. 2d 18, 452 N.W.2d 555, 560 (Wis. 1990). Congress has determined that "the fifty States and the Federal Government provide sufficient jurisdictions to properly regulate pesticides." *Id.* at 558 (quoting S. Rep. No. 838, 92d Cong., 2d Sess. 16, reprinted in 1972 U.S. Code Cong. & Admin. News 3993, 4008). Further, Congress has found that local units of government lack "the financial wherewithal to provide necessary expert regulation comparable with that provided by the State and Federal Governments," and that permitting local regulation "would be an extreme burden on interstate commerce." *Id.*

Under the supremacy clause of article VI of the Constitution, preemption occurs where federal legislation is so comprehensive, it can be inferred that Congress "left no room" for supplementary regulation. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). Through FIFRA, Congress has legislated comprehensively, occupying the field of pesticide regulation, and leaving no room for supplementary regulation below the federal level, except for the specific authority granted in FIFRA to each "State." *Professional Lawn Care Ass'n v. Village of Milford*, 909 F.2d 929, 934 (6th Cir. 1990), petition for cert. filed, 59 U.S.L.W. 3180 (U.S. Aug. 31, 1990) (No. 90-382). Thus, "[w]hile the regulation of pesticides traditionally lies within the police powers of local communities, the federal legislation 'deprives' them of that authority." *Mortier*, 452 N.W.2d at 560.

A. The 1972 Amendments to FIFRA Left No Room for Local Regulation

"Because of mounting public concern about the safety of pesticides and their effect on the environment," Congress completely rewrote FIFRA in 1972, and "transformed [it] from a labeling law into a comprehensive regulatory statute." *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 991 (1984). See Federal Environmental Pesticide Control Act of 1972 ("FEPCA"), Pub. L. No. 92-516, 86 Stat. 973. In so doing, Congress "divid[ed] the responsibility between the States and the Federal Government for the management of an effective pesticide program." H. Rep. No. 511, 92d Cong., 1st Sess. 16 (1971) (emphasis added). Therefore, "when Congress rewrote the statute, it impliedly preempted the local regulation of pesticides." *Professional Lawn Care Ass'n*, 909 F.2d at 933.

"[T]he intent behind the 1972 amendments was to enact sweeping federal pesticide regulation . . . that cast a regulatory net over pesticides and their use." *Id.* The 1972 revision to FIFRA "was so comprehensive that courts would have treated

the entire field [of pesticide regulation] as having been occupied by the federal government absent the express disclaimer contained in § 24 of the Act.” *Id.* at 940 (Nelson, J., concurring).³

Section 24 of FIFRA (“Authority of States”) provides that “[a] State may regulate the sale or use of any federally registered pesticide,” but “shall not impose or continue in effect any requirements for labeling or packaging in addition to or different from those required” by EPA under FIFRA. 7 U.S.C. § 136v(a), (b). Thus, “Congress explicitly preserved the states’ right to regulate the ‘sale and use’ of pesticides while reserving ‘labeling’ to federal control.” *New York State Pesticide Coalition, Inc. v. Jorling*, 874 F.2d 115, 118 (2d Cir. 1989). Section 24(a), therefore, is “an affirmative grant of permission for ‘a State’ to regulate pesticide use.” *Professional Lawn Care Ass’n*, 909 F.2d at 940-41 (Nelson, J., concurring) (emphasis added); see also *Mortier*, 452 N.W.2d at 559.⁴

³ The Act broadly defines “pesticide” as “(1) any substance or mixture of substances intended for preventing, destroying, repelling, or mitigating any pest, and (2) any substance or mixture of substances intended for use as a plant regulator, defoliant, or desiccant.” 7 U.S.C. § 136(u). Accordingly, pesticides subject to FIFRA regulation include, but are not limited to, termiticides and other chemicals used in structural pest control; crop protection chemicals such as insecticides, herbicides, fungicides and plant growth regulators; horticultural chemicals used for lawn and garden care, and in greenhouses and nurseries; right-of-way herbicides used by electric utility companies; industrial biocides used in manufacturing processes; and pesticides applied aerially for wide-area control of mosquitoes, gypsy moths, and forest and other pests.

⁴ The flaw in petitioners’ contention that FIFRA’s silence on political subdivisions somehow authorizes them to regulate pesticides is highlighted by the express limitation on the States’ authority set forth in § 24(b) (“Uniformity”). It would be absurd to interpret the Act as impliedly authorizing tens of thousands of local governments to do what, in the interest of uniformity, the statute expressly prohibits the States from doing. Despite their topsy-turvy “logic,” petitioners concede this point. See Brief of Petitioners at 31 n.5.

Further, “Congress left no doubt about what it meant when it referred to a ‘State.’” *Mortier*, 452 N.W.2d at 560; see 7 U.S.C. § 136(aa).⁵ “In effect, [FIFRA § 24] is a declaration of negative preemption,” affirmatively granting “specific authorization for ‘states’ to regulate the sale or use of pesticides.” *Mortier*, 452 N.W.2d at 559.⁶ “From this alone, it is possible to infer that regulation by other governmental entities not protected from preemption by [§ 24], is preempted.” *Id.* at 560.⁷

When the legislative history underlying enactment of the Federal Environmental Pesticide Control Act of 1972 is examined, “[t]he intent of congress — to preempt local, but not state, regulation — becomes abundantly clear.” *Mortier*, 452

⁵ “The term ‘State’ means a State, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, the Trust Territory of the Pacific Islands, and American Samoa.” *Id.*

⁶ As an adjunct to this regulatory authority, Congress gave the States authority to operate EPA-approved plans for certification of restricted-use pesticide applicators. See FIFRA § 11, 7 U.S.C. § 136i; *infra* at 12 n.9. Congress also authorized the States, subject to EPA approval, to enforce pesticide use violations. See FIFRA §§ 23, 26, 27, 7 U.S.C. §§ 136u, 136w-1, 136w-2. It should be noted that state pesticide statutes are enacted pursuant to, and are limited by, FIFRA’s grant of regulatory and enforcement authority to the States.

⁷ In an unpublished decision affirming “the well-reasoned opinion” by the Maryland federal district court that FIFRA preempts all local regulation of pesticides, including pesticide posting and notification requirements, the U.S. Court of Appeals for the Fourth Circuit noted as follows:

Prior to the [1972] amendment, state and local subdivisions had exercised regulatory powers over pesticides. Section 136v [FIFRA § 24] defines the extent to which they may continue to exercise regulatory authority. It expressly grants a *state* limited authority to regulate pesticide use.

Maryland Pest Control Ass’n v. Montgomery County, Maryland, 822 F.2d 55 (4th Cir. 1987) (unpublished opinion reproduced at 27 Env’t Rep. Cas. (BNA) 1150, 1151) (emphasis added).

N.W.2d at 558. For example, with the unanimous consent of the Senate, Sen. Allen, who chaired the subcommittee of the Senate Committee on Agriculture and Forestry responsible for the 1972 FEPCA amendments to FIFRA, inserted into the *Congressional Record* the following passage from S. Rep. No. 92-838:

[i]t is the intent that [FIFRA] section 24, by not providing any authority to political subdivisions and other local authorities of or in the States, *should be understood as depriving such local authorities and political subdivisions of any and all jurisdiction and authority over pesticides and the regulation of pesticides.*

118 Cong. Rec. 32,256 (daily ed. Sept. 26, 1972) (quoting S. Rep. No. 838, 92d Cong., 2d Sess. 16-17, *reprinted in* 1972 U.S. Code Cong. & Admin. News 3993, 4008) (emphasis added)).

The congressional deliberations which led to the decision not to allow local regulation are amply described in the cases and in respondents' brief, and the *amici* will not recount them here. Suffice it to say, "the legislative history could not be more clear." *Maryland Pest Control Ass'n v. Montgomery County, Maryland*, 646 F. Supp. 109, 111 (D. Md. 1986), *aff'd*, 822 F.2d 55 (4th Cir. 1987). "[It] reveals a clear intent of the congress to preempt all local regulation of the use of pesticides." *Mortier*, 452 N.W.2d at 555.⁸

⁸ *People ex rel. Deukmejian v. County of Mendocino*, 36 Cal. 3d 476, 204 Cal. Rptr. 897, 683 P.2d 1150 (1984), upon which petitioners repeatedly rely, was expressly overturned by the California Legislature, a fact which petitioners fail to note. See 1984 Cal. Stat. c. 1386, sec. 3 (noted at Cal. Food & Agricultural Code § 11501.1 (West 1986)). The opinion of the Maine Supreme Judicial Court in *Central Maine Power Co. v. Town of Lebanon*,

(Footnote continued on next page)

That the question of local regulation was the subject of debate within, and even temporary disagreement between, congressional committees responsible for rewriting FIFRA, only confirms that the ultimate exclusion of local authority was a carefully considered decision by both houses of Congress. "The decision was made well in advance of enactment of the legislation, it was known to and accepted by the members of the responsible committees, and it was openly explained prior to enactment." *Professional Lawn Care Ass'n*, 909 F.2d at 937 (Nelson, J., concurring). Thus, although an amendment permitting local regulation was considered, the "legislative history demonstrates that Congress *positively rejected* the proposal to make room for local governments in the field of pesticide regulation." *Id.* at 934 (emphasis added).

B. EPA Has Repeatedly Acknowledged that Only the States Themselves Have Supplementary Regulatory Authority

Congress entrusted the United States Environmental Protection Agency with administration of FIFRA. In carrying out this responsibility, EPA has explicitly interpreted the Act as preempting regulation of pesticides by local units of government: "It is not the intention of the Act . . . to authorize political subdivisions below the State level to further regulate pes-

(Footnote continued from previous page)

571 A.2d 1189 (Me. 1990), was rendered without the benefit of the *Mortier* and *Professional Lawn Care Ass'n* decisions, and contains virtually no FIFRA preemption analysis or discussion of FIFRA's legislative history. The district court's decision in *COPARR, Ltd. v. City of Boulder*, 735 F. Supp. 363 (D. Colo. 1989), *appeal abated pending resolution of Wisconsin Public Intervenor v. Mortier*, No. 89-1341 (10th Cir. Jan. 15, 1991), is flawed because it rejects preemption of all local pesticide regulation on the erroneous theory that a home rule city can exercise the authority which Congress expressly reserved for the States themselves. See *infra* at 16 n.11.

ticides." 40 Fed. Reg. 11,698, 11,700 (1975).⁹ The Court should give deference to this definitive, longstanding, published agency interpretation, and not to the advocacy position being advanced by the Government's attorneys in this case.

Furthermore, the Government attorneys' arguments are belied by the fact that at each of the congressional hearings leading to enactment of the 1972 amendments, EPA urged

⁹ EPA provided this interpretation in response to a State's suggestion that an EPA rule regarding federal approval of state plans for certification of restricted-use applicators should allow local agencies to assist state authorities in implementing and maintaining the States' certification program. *Id.* EPA's interpretation relates to FIFRA § 24 in that certification of applicators is an *integral part* of the States' authority to regulate pesticide use pursuant to § 24(a). Indeed, the very purpose of applicator certification is to ensure that when EPA classifies a pesticide for restricted use, "the pesticide shall be applied for any use to which the restricted classification applies only by or under the direct supervision of a certified applicator." 7 U.S.C. § 136a(d)(1)(C)(i) (emphasis added). Thus, the Solicitor General's assertion (Brief for the United States at 22 n.20) that applicator certification does not pertain to state authority to regulate pesticide use is entirely incorrect.

Furthermore, EPA indicated that because of FIFRA's preclusion of local regulation, local assistance with state certification programs would be permitted only if it "is uniform throughout the State and is totally responsive to State direction." 40 Fed. Reg. at 11,700. This is the type of federal-state-local cooperation in implementing FIFRA's regulatory program contemplated by FIFRA § 22(b), 7 U.S.C. § 136t(b). Thus, contrary to petitioners' contention (Brief of Petitioners at 31-32), § 22(b) does not give local governments regulatory authority; nor does it "equate" political subdivisions with state agencies, as the Solicitor General erroneously asserts (Brief for the United States at 11). Instead, the role of local governments is limited to providing any specific assistance which EPA or a State may authorize, request, and approve with respect to implementation or enforcement of EPA's or a State's pesticide program. That is far different from affording authority to local governments to adopt their own regulations, even if subject to state approval. If Congress had wanted to give local governments authority to regulate pesticide use, it would have done so in FIFRA § 24 (as it did for the States), not in a different section of the Act.

Congress to strengthen and expand the role of the federal government in pesticide regulation, while allowing the States to play a supplementary role. For example, EPA Administrator William D. Ruckelshaus testified that EPA "would expect to assist the States in setting up pesticides programs or bringing existing programs into accord with EPA standards." *Federal Environmental Pesticide Control Act of 1971: Hearings Before the House Comm. on Agriculture on H.R. 26*, 92d Cong., 1st Sess. 730 (1971) (emphasis added). Similarly, EPA Assistant Administrator David D. Dominick explained that the Act as amended would "specif[y] the pesticide regulatory authority retained by the States." *Federal Environmental Pesticide Control Act: Hearings Before the Subcomm. on Agricultural Research and General Legislation of the Senate Comm. on Agriculture and Forestry on H.R. 10729*, 92d Cong., 2d Sess. 93 (1972) (emphasis added).

At no time did EPA suggest that Congress should place pesticide regulatory authority into the hands of tens of thousands of local units of government. That would have been contrary to EPA's call for a federal pesticide statute which "broadens the scope of Federal regulation," extending even to intrastate products in order "to insure fairness and uniformity." *Id.* at 157; *Hearings on S.232, S.272, S.660, and S.745*, at 292-93.

From the outset, therefore, EPA recognized that by transforming FIFRA from a misbranding law into a comprehensive regulatory statute, Congress was occupying the entire field of pesticide regulation, except for the supplementary regulatory authority granted to the States. EPA has repeatedly confirmed this view. For example, in implementing 1978 amendments to subsection (c) of FIFRA § 24, EPA explained that "[t]he new legislation amends § 24(c) of FIFRA to provide the States with greater flexibility and independence in issuing registrations for 'special local needs.'" 44 Fed. Reg. 4352, 4359 (1979) (emphasis added); see 7 U.S.C. § 136v(c). Further, "Congress'

general intent [was] to broaden State registration authority under the amended section.” 44 Fed. Reg. 46,414, 46,415 (1979) (emphasis added); see also 46 Fed. Reg. 2008, 2010 (1981). Thus, EPA correctly interpreted FIFRA § 24 as embodying an affirmative grant of authority to the States in a regulatory field which otherwise has been occupied by the Federal Government through the sweeping pesticide legislation enacted by Congress.

C. Congress Recently Reaffirmed Its Intention To Preempt Local Regulation

Congress’ most recent major amendments to FIFRA were in 1988, when EPA’s role in regulating pesticides, including especially review and reregistration of previously registered pesticides, was strengthened and expanded. See Federal Insecticide, Fungicide, and Rodenticide Act Amendments of 1988, Pub. L. No. 100-532, 102 Stat. 2654. In enacting the 1988 amendments, Congress noted “the desire by States and their political subdivisions to assert greater control over pesticide use.” H. Rep. No. 939, 100th Cong., 2d Sess. 29, reprinted in 1988 U.S. Code Cong. & Admin. News 3474, 3478 (emphasis added); see also S. Rep. No. 346, 100th Cong., 2d Sess. 7 (1988).

Congress, however, did *not* respond by amending FIFRA to give local units of government authority to regulate pesticides. Instead, Congress amended FIFRA by establishing a new EPA pesticide reregistration program in order to “restore[] confidence in the regulatory system that governs pesticide approval and use.” *Id.* In this regard, Congress explained that the new reregistration provisions “would not restrict the authority of any . . . State as provided under section 24 of the Act to regulate the sale or use of any federally-registered pesticide or device in the State.” H. Rep. No. 939, at 30, reprinted in 1988 U.S. Code Cong. & Admin. News at 3479 (emphasis added). Congress, therefore, was aware of the desire of many local

governments to regulate pesticides, but refused to undermine the long-established FIFRA system of federal and supplementary state regulation by granting any such authority.¹⁰

D. State Delegation of Regulatory Authority to Local Governments Would Contravene Congressional Intent

It would be completely at odds with § 24, and would defeat congressional intent, to interpret FIFRA in a manner that allows a State to delegate its pesticide regulatory authority to local governments, or that tolerates usurpation by local governments of such state authority. See *supra* at 12 n.9. “Congress did not intend to permit states to exercise their remaining authority . . . by delegating it to municipalities.” *Consolidated Rail Corp. v. Smith*, 664 F. Supp. 1228, 1237 (N.D. Ind. 1987) (municipal train speed ordinances preempted by federal statute which occupied the field of railroad safety but authorized state railway safety rules to address local safety hazards). The statute “does not say a state may regulate by ordinance.” *Id.*; see also *Donelon v. New Orleans Terminal Co.*, 474 F.2d 1108, 1112 (5th Cir.),

¹⁰ Under the principle of congressional adoption, “Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change.” *Lorillard v. Pons*, 434 U.S. 575, 580 (1978). At the time Congress enacted the 1988 FIFRA amendments, the only viable appellate decision on FIFRA preemption of local regulation was the June 1987 decision of the U.S. Court of Appeals for the Fourth Circuit affirming FIFRA preemption. *Maryland Pest Control Ass’n*, 822 F.2d 55. (As discussed *supra* at 10 n.8, the California Legislature had expressly overturned the holding of the Supreme Court of California in *People ex rel. Deukmejian v. County of Mendocino*.) In addition, the only published administrative interpretation was EPA’s declaration that FIFRA does not authorize political subdivisions to regulate pesticides. See 40 Fed. Reg. at 11,700. As a result, because Congress took no action with respect to regulation by local governments when it amended FIFRA in 1988, Congress should be deemed to have adopted EPA’s and the Fourth Circuit’s interpretation that FIFRA is intended to preempt such regulation.

cert. denied, 414 U.S. 855 (1973) (the Act "speaks of an exception for 'States,' and we . . . have before us individual officials of a parish government").

Thus, Congress meant what it said in FIFRA § 24(a), which extends pesticide regulatory authority only to a "State" as that term is expressly defined in the Act. See H. Rep. No. 511, 92d Cong., 1st Sess. 16 (1971) (EPA cannot delegate to the States authority to set aside the preemption provisions of § 24(a)). Under the theory posited in the *amicus* brief submitted in support of petitioners by a handful of States, Congress could never, in occupying a regulatory field, determine that its goals will be met only by granting supplementary regulatory authority to the States themselves, and not to their political subdivisions. If the contention of those *amici* was correct, then federal law could never preempt local law — a proposition flatly contradicted by this Court's rulings that the supremacy clause applies to local regulation as well as state law.¹¹

In summary, "Congress focused upon the very question here presented and concluded that only States and not their subdivisions should be authorized to regulate the sale and use of pesticides." *Maryland Pest Control Ass'n*, 646 F. Supp. at 111. "[I]t is the policy of the United States Congress to allocate the power to regulate pesticides at a level that stops at the state level." *Mortier*, 452 N.W.2d at 561.

¹¹ Petitioners' invocation of the Tenth Amendment is a red herring. No decision of this Court suggests that the Tenth Amendment should be interpreted in a way that nullifies the supremacy clause of art. VI, which applies to local as well as state regulation. See *Hillsborough County, Florida v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 712 (1985); see, e.g., *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624, 638 (1973) (city ordinance imposing curfew on aircraft to regulate noise preempted by federal statute because "the pervasive control vested in EPA and in FAA under the 1972 Act seems to us to leave no room for . . . local controls").

II. Local Regulation Would Obstruct Congress' Objectives

Local regulation also is preempted when it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hillsborough County v. Automated Med. Labs.*, 707 U.S. at 713 (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)). Even if a local ordinance has the same ultimate goal as a federal statute (e.g., protection of health and the environment), the local law is preempted "if it interferes with the methods by which the federal statute was designed to reach this goal." *International Paper Co. v. Ouellette*, 479 U.S. 481, 494 (1984); see also *Taylor v. General Motors Corp.*, 875 F.2d 816, 826 (11th Cir. 1989), cert. denied, 110 S. Ct. 1781 (1990) (citing *Brown v. Hotel & Restaurant Employees & Bartenders International Union*, 468 U.S. 491, 501 (1984)) (even if statutory language or legislative history is unclear, preemptive intent can be inferred solely from deleterious effects on the federal scheme).

Allowing each local government in the United States to concoct its own scheme for regulating pesticides would make it impossible to maintain the comprehensive system of coordinated federal and supplementary state regulation which Congress sought to achieve through enactment of FIFRA. Equally important, local regulation would interfere with Congress' goal of providing the public, agriculture, and industry with cost-effective pest control. These are crucial points which go to the heart of preemption, but which petitioners and their *amici* (including the Solicitor General) completely ignore. Thus, to the extent, if any, congressional intent to preclude local regulation is unclear from FIFRA's language or legislative history, local regulation nevertheless is preempted because it would thwart Congress' objectives.¹²

¹² The dissenting opinions in *Mortier* focus on the minutiae of FIFRA's legislative history, but do not consider at all the actual conflict between local regulation and FIFRA's goals.

A. Local Regulation Would Undermine the Comprehensive System of Federal-State Regulation Established by FIFRA

"The control and regulation of pesticides is a complex and difficult task." S. Rep. No. 334, 95th Cong., 1st Sess. 33 (1977). For this reason, Congress determined that its goals should be accomplished by giving sweeping pesticide regulatory authority to EPA — a federal agency that would have the necessary experience, expertise, financial resources, national perspective, and objectivity to determine which pesticides should be approved for use, and what restrictions on their use should, and should not, be imposed to maintain their benefits while minimizing any risks to applicators or the public. Furthermore, because regulating pesticides is not a job for amateurs, Congress extended supplementary authority only to States' pesticide regulatory agencies, which would have to meet certain federal statutory standards (*see* 7 U.S.C. §§ 136c(f), 136i(a)(2), 136v), and would coordinate their activities with EPA and each other.

Congress' overall objective in enacting FIFRA was to "regulate the use of pesticides to protect man and his environment," including "extend[ing] Federal pesticide regulation to actions entirely within a single State." S. Rep. No. 838, 92d Cong., 2d Sess. 1, *reprinted in* 1972 U.S. Code Cong. & Admin. News 3993. Through FIFRA, Congress intended to "provide for a more finely tuned control of pesticides which will *more easily permit their beneficial use and prevent their misuse.*" *Id.* at 5, *reprinted in* 1972 U.S. Code Cong. & Admin. News 3993, 3997 (emphasis added).¹³

¹³ Congress made it clear that regulation of a pesticide should take into account "the benefits from its use." S. Rep. No. 838, 92d Cong., 2d Sess. 1, *reprinted in* 1972 U.S. Code Cong. & Admin. News 3993. As a result, FIFRA's statutory standard for registration — whether a pesticide will perform its function without "unreasonable adverse effects on the enviro-

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Petitioners and most of their *amici* clearly miscomprehend the expansive scope of FIFRA's statutory scheme (*see* Brief of Petitioners at 71).¹⁴ Pursuant to its broad authority under FIFRA, EPA regulates registration, labeling *and* use of all pesticides, whether in interstate or intrastate commerce. *See*

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ment" — requires a balancing of the pesticide's "economic, social, and environmental costs *and* benefits." *See* 7 U.S.C. §§ 136a(c)(5), 136(bb) (emphasis added). Thus, "[d]ecisions under FIFRA are case-by-case analyses of risks and benefits and as such require *exhaustive consideration* of costs and benefits of permitting or denying use." S. Rep. No. 334, 95th Cong., 1st Sess. 32-33 (1977) (emphasis added). Most local governments are utterly incapable of such "exhaustive consideration."

¹⁴ For example, petitioners and certain *amici* erroneously imply that pursuant to FIFRA, neither EPA nor the States can address local needs or concerns with respect to pesticides. To the contrary, insofar as particular areas within a State may have special conditions warranting localized regulation, "EPA may, where appropriate, in setting labeling and packaging requirements, give consideration to regional, State, and *local* needs." H. Rep. No. 511, 92d Cong., 1st Sess. 16 (1971) (emphasis added). FIFRA also grants the States the authority to address local concerns. Pursuant to FIFRA § 24(c), a State is authorized, subject to EPA oversight, to approve additional uses of federally registered pesticides "to meet special local needs." 7 U.S.C. § 136v(c). Furthermore, the States' authority under § 24(a) to regulate sale and use of federally registered pesticides allows a State to impose localized restrictions on use. For example, a number of States in the Northwest and the South have adopted highly localized restrictions on timing of phenoxyherbicide applications in order to prevent damage to nontarget crops. As another example, California and Arizona have restricted use of cotton dessicants in certain areas of those States in response to local concerns about the odor of such pesticides.

Thus, there is no need for local governments to regulate pesticides, even if local conditions warrant localized restrictions. Both EPA and a State's pesticide agency have authority to adopt and enforce such restrictions, and unlike individual local governments, have the necessary scientific expertise and other resources, and are in a position to ensure that localized restrictions do not conflict with each other or adversely impact other localities within the State.

7 U.S.C. § 136a(a). This encompasses extensive data requirements for pesticide registration, including product chemistry, toxicology, environmental fate, and residue data;¹⁵ the content, wording and format of pesticide labels and labeling, including hazard warnings, safety precautions, and protective equipment requirements;¹⁶ classification of pesticides as restricted-use products, and standards for training and certifying applicators of such products;¹⁷ post-registration scientific review of pesticide risks and benefits;¹⁸ data call-ins to fill any data gaps, and reregistration of previously registered products;¹⁹ standards and procedures for suspension and cancellation of problem pesticides;²⁰ regulation of pesticide transportation, storage and disposal;²¹ and enforcement.²² To carry out this comprehensive regulatory program,²³ EPA has a budget of \$95 million and a pesticide staff of 1,000 located at the Agency's Headquarters and in ten Regional Offices.

¹⁵ See 7 U.S.C. § 136a(c)(2); 40 C.F.R. pt. 158 (1990).

¹⁶ See 7 U.S.C. § 136a(c)(5); 40 C.F.R. pt. 156 (1990).

¹⁷ See 7 U.S.C. §§ 136a(d), 136i; 40 C.F.R. § 152.160 (1990); 40 C.F.R. pt. 171 (1990); see also 55 Fed. Reg. 46,890 (1990).

¹⁸ See 7 U.S.C. § 136a(c)(8); 40 C.F.R. pt. 154 (1990).

¹⁹ See 7 U.S.C. §§ 136a(c)(2)(B), 136a-1; 40 C.F.R. § 152.144 (1990); see also 54 Fed. Reg. 18,076 (1989).

²⁰ See 7 U.S.C. § 136d; 40 C.F.R. pt. 164 (1990).

²¹ See 7 U.S.C. § 136q; 40 C.F.R. pt. 165 (1990).

²² See 7 U.S.C. §§ 136j, 136l, 136w-1, 136w-2; 40 C.F.R. pt. 168 (1990).

²³ Whether the statutory scheme enacted by Congress is comprehensive or extensive is hardly an issue of fact, much less a disputed one, as petitioners suggest. Brief of Petitioners at 60 n.15. Indeed, this Court has observed that in 1972 Congress transformed FIFRA into a "comprehensive regulatory statute." *Ruckelshaus v. Monsanto Co.*, 467 U.S. at 991. Furthermore, petitioners' belief that "federal and state regulation of pesticides has been shoddy" (*id.* at 69) does not negate federal preemption. If petitioners or their amici want the statute changed, they should raise their contentions with Congress, not with this Court.

As discussed above, FIFRA also grants supplementary regulatory authority to the States, subject to certain EPA oversight, to further regulate sale and use (but not labeling) of federally registered pesticides. See 7 U.S.C. §§ 136c(f), 136i, 136v. Pursuant to this authority, every State has created one or more pesticide regulatory agencies, which closely coordinate their activities with EPA.²⁴ See generally 7 U.S.C. § 136u ("State Cooperation, aid, and training").

Local regulation would seriously undermine this comprehensive statutory scheme. It would supplant federal-state regulation with a bewildering multitude of disparate, overlapping, scientifically unwarranted, ill-considered, poorly drafted, onerous, costly, and politically motivated ordinances that would discourage, delay, disrupt or prevent application of beneficial, EPA and state-approved pesticides. In so doing, local regulation would effectively supersede federal and state regulatory determinations regarding, for example, whether a particular pesticide poses unacceptable risks for a particular use; what restrictions on application or use of the pesticide are adequate to protect the public; whether the pesticide should be applied only by or under the supervision of certified applicators, and what the requirements for training and certification of applicators should be; and what warnings or notifications should be provided in connection with use of the pesticide, and to whom, when, and in what manner.²⁵ These and similar EPA or state regulatory determina-

²⁴ To facilitate federal-state coordination, EPA has established the State FIFRA Issues Research and Evaluation Group ("SFIREG"), an advisory committee. In addition, the States coordinate their pesticide regulatory activities with each other through groups such as the National Association of State Departments of Agriculture ("NASDA"), the Association of American Pesticide Control Officials ("AAPCO"), and the Association of Structural Pest Control Regulatory Officials ("ASPCRO").

²⁵ Contrary to the suggestion of some of petitioners' amici, who pretend that FIFRA's expansive regulatory scope is limited to registration of pesticides, restrictions on pesticide use, including notification and posting (Footnote continued on next page)

tions would become meaningless wherever a local government attempted to decide for itself how that pesticide should be regulated. "It is unlikely — to say the least — that Congress intended to establish such a chaotic regulatory structure." *International Paper Co. v. Ouellette*, 481 U.S. at 497.

Even though local regulation would wreak havoc with the scheme of federal-state regulation established by FIFRA, local governments are *not* in a better position than EPA or a State's pesticide agency to know how to protect their citizens from the risks, if any, of pesticides that are applied in accordance with

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requirements, fall squarely within the purview of FIFRA's federal-state regulatory scheme. See *New York State Pesticide Coalition, Inc. v. Jorling*, 874 F.2d 115, 117, 119 (2d Cir. 1989) (FIFRA § 24 permits States to regulate sale and use of pesticides through public notification requirements). Furthermore, local restrictions on pesticide use, including especially local notification and posting requirements, would have much more than an "incidental" effect on EPA or state regulation of pesticide use. See *Professional Lawn Care Ass'n*, 909 F.2d at 932 (if a local ordinance "imposes requirements that pesticide users must fulfill, and practices they must follow, before and after applying pesticides . . . [it] is an attempt by a local government to regulate pesticides and their use"). Moreover, posting and notification of pesticide applications is actually regulated by EPA and the States, and therefore, local posting and notification requirements would be preempted even under the narrow view of preemption advocated by certain of petitioners' amici (see, e.g., Brief of Amici Curiae Village of Milford, Michigan, Mayfield Village, Ohio, and City of Boulder, Colorado at 25). More specifically, pursuant to its authority under FIFRA, EPA has proposed regulations regarding posting of pesticide applications and notification to workers in farms, forests, nurseries, and greenhouses. See 53 Fed. Reg. 25,970, 26,008 (1988). In addition, pursuant to their authority to regulate pesticide use under FIFRA § 24(a), 7 U.S.C. § 136v(a), many States have adopted their own uniform, statewide posting and notification requirements, which typically govern application of pesticides used in structural pest control as well as in agricultural and horticultural uses. See, e.g., *New York State Pesticide Coalition v. Jorling*. Local posting and notification requirements are preempted even in States which have decided not to adopt such requirements.

EPA-approved label directions, restrictions, and precautions. As Congress recognized, the vast majority of local governments, unlike EPA and state pesticide agencies, do not have the resources and expertise to review extensive toxicology and other data, and to make well-informed regulatory decisions regarding a pesticide's use. See S. Rep. No. 838, 92d Cong., 2d Sess. at 16-17, reprinted in 1972 U.S. Code Cong. & Admin. News 3993, 4008. Thus, local governments would be arbitrarily upsetting EPA's and state agencies' carefully balanced decisions as to which restrictions should — and should not — be imposed on particular pesticides (or pesticides in general) and on those who apply them. Local regulation is preempted, therefore, because it would be an obstacle to accomplishment of the objectives which Congress sought to achieve through FIFRA's federal-state scheme of regulation.

B. The Regulatory Chaos Ensuing from Local Regulation Would Prevent Cost-Effective Pest Control

"An overriding concern of FIFRA is that pesticides should be available to meet pest control needs . . . for public health, agricultural production, food safety, and other reasons." S. Rep. No. 334, 95th Cong., 1st Sess. 3, 5 (1977). Congress reaffirmed this goal when it amended the Act in 1988, explaining that the purpose of the amendments was

to strengthen the protection of public health and the environment; to increase public confidence that pesticides are approved and used in a manner consistent with current health and safety requirements; [and] to ensure that pesticide users, including agricultural producers, will have access to the effective and affordable products they need on the farm, in the workplace, and at home

H. Rep. No. 939, 100th Cong., 2d Sess. 28, reprinted in 1988 U.S. Code Cong. & Admin. News 3474, 3476-77 (emphasis

added); *see also* S. Rep. No. 346, 100th Cong., 2d Sess. 6 (1988).

In addition to destroying the federal-state scheme of regulation, however, local regulation would sabotage Congress' goal of cost-effective pest control. It would subject users and commercial applicators of pesticides, and also the companies that distribute them, to a morass of unnecessary, conflicting, and burdensome requirements and restrictions that would impair or impede timely, affordable, efficacious pest control. The regulatory chaos that local regulation would engender underscores the wisdom of Congress' decision to preclude all pesticide regulation below the state level:

1. Multiple Ordinances

Most commercial applicators, whether structural, agricultural, or industrial, are highly mobile, and operate in dozens, if not hundreds, of local jurisdictions. They must do this in order to survive economically. This is especially true since the vast majority of structural pest control operators (upon whom the public heavily depends), and custom and aerial applicators (upon whom today's farmers and electric utilities heavily depend), are small businesses with slim profit margins. Requiring these companies to comply with a different set of pesticide regulations in every village, town, city or county which they serve would transmogrify their day-to-day business operations into a logistical nightmare.

Routing and scheduling a company's limited number of applicators through such a regulatory maze would be extraordinarily complicated. For example, if local regulation were allowed, an individual structural pest control operator, who often has to service homes or buildings in ten towns in two or three counties on a single day, could be confronted with a dozen sets of posting and notification requirements. Similar multiple requirements could affect custom applicators responsible for controlling and maintaining rights-of-way for electric power

transmission and distribution lines, which encompass geographic corridors stretching for miles and typically span numerous political subdivisions within a single State.

Each set of local posting and notification requirements could differ regarding the size, color, content, and language of warning signs; where in, on, or near a building or site they must be placed; how far in advance of an application they must be posted; and how long after an application they must remain. In addition, each local jurisdiction could have its own restrictions regarding which pesticides can be used, or whether they can be tank mixed or combined with other pesticides; or whether a permit must be obtained prior to making a specific application, and if so, what information must be provided in advance to the local government, and when; or whether applicators must meet local certification and training requirements in order to use a particular pesticide. Besides attempting to actually comply with each local jurisdiction's requirements, the tracking of such requirements, educating applicators regarding them, and maintaining adequate records to document compliance would be formidable tasks, but necessary in order to avoid local enforcement actions and liability suits based on alleged violations of local restrictions.

As a result of the foregoing, multiple ordinances would make it impossible for many pest control companies and custom applicators to deliver timely pesticide services. Most commercial applicators either would have to avoid servicing locally regulated areas altogether, or would have to pass the substantial costs of compliance on to those pest control customers who could still afford professional service. Either way, cost-effective pest control would be unavailable. Furthermore, if a local ordinance did not cover do-it-yourself pest control, homeowners or other untrained individuals might have to attempt pesticide applications themselves, thereby greatly increasing the potential

for misuse and the resultant risk of personal or environmental injury.

2. Overlapping Ordinances

The difficulty of complying with multiple pesticide regulations in neighboring jurisdictions would be exacerbated by the fact that many units of local government overlap. For example, if local regulation were allowed, a single farm could be subject to overlapping restrictions imposed by the township and county in which it is located, and also by power, irrigation, and other special governmental districts. Similarly, a high school cafeteria could be subject to overlapping regulations adopted by an independent school and a public health district, and by the city and county. Just determining which sets of pesticide regulations are applicable to a particular structure or farm would be a complex undertaking.

3. Conflicting or Inconsistent Ordinances

As if multiple and overlapping pesticide ordinances would not be enough of a problem, it is highly probable that local regulations would conflict or be inconsistent with each other, and with federal and state requirements. Indeed, the rationale for local regulation espoused by petitioners and their *amici* (a rationale which Congress flatly rejected), is that every unit of local government needs to protect its constituents by deciding for itself precisely how pesticides should be regulated within its geographic boundaries.

Local ordinances which conflict or are inconsistent with each other could have serious public health or economic consequences. For example, the recent encephalitis outbreak in Florida required prompt, widespread, uniform aerial application of pesticides to control disease-carrying mosquitoes. That would have been impossible to accomplish if there had been conflicting or inconsistent local regulations governing which pesticides could be applied, by whom, where, when, and

how. Moreover, if even a single town or county in Florida had prohibited or delayed a necessary application, the untreated area would have become a refuge for the infected mosquitoes. Similarly, if there were conflicting or inconsistent local regulations in California, cost-effective control of Medflies, which have plagued the agricultural economy in that State, would be impaired.

There also would be dire consequences if local governments were free to impose requirements which conflict with EPA label precautions, or with other federal or state restrictions. For example, local ordinances which fail to take into account EPA-imposed reentry periods for certain structural fumigants or agricultural chemicals could jeopardize the safety of the public or workers.

As discussed above, one of Congress' recently articulated goals for FIFRA is "to increase public confidence that pesticides are approved and used in a manner consistent with public health and safety requirements." H. Rep. No. 939, at 28, *reprinted in* 1988 U.S. Code Cong. & Admin. News at 3477. Local pesticide ordinances, however, especially when they conflict with each other or with EPA or state regulatory determinations, would erode public confidence by creating public confusion about pesticides and their risks. This is another reason why pesticide regulation below the state government level would conflict with FIFRA's purposes.

4. Onerous Ordinances

Through FIFRA, Congress has sought to achieve one of the "laudable goals of contemporary environmental legislation: Regulatory reform — *lessening burdens on the private sector and simplifying the regulatory process.*" 44 Fed. Reg. at 4352 (emphasis added). Local regulation, however, would have exactly the opposite effect, burdening the public, the pest control industry, and agriculture with a myriad of requirements and restrictions, none of which EPA or state pesticide agencies have

determined are necessary. A good example of an onerous local ordinance is the one involved in this case, which includes permitting provisions which are so cumbersome and elaborate that they can barely conceal their true purpose — to prevent or discourage the use of EPA-registered and state-approved pesticides.

The *amici curiae* in no way underestimate the creativity that local governments would display in devising their own burdensome pesticide regulatory schemes, especially when their actions are dictated by anti-pesticide groups, which for the most part have been unsuccessful in influencing the regulatory decisions of the professionals employed by EPA and state pesticide agencies. Thus, unless FIFRA preemption of local regulation is affirmed, Congress' efforts to centralize, standardize and modernize pesticide regulation, and to make it more scientific, better balanced, and less political and emotional, will be set back at least twenty years.²⁶

²⁶ The *amici curiae* submitting this brief strongly believe that FIFRA preempts all local regulation of pesticides. If, however, the Court should be disinclined to so hold, the *amici* urge the Court not to find or in any way suggest that local governments have blanket regulatory authority over pesticides. Instead, the Court should make it clear that its ruling in this case does not foreclose future preemption challenges to local ordinances, requirements, or restrictions which conflict or interfere with federal or state regulation of pesticides. It should be noted that this is a point conceded by the Public Citizen Litigation Group in its *amicus* brief, which merely opposes blanket preemption (see Brief of *Amici Curiae* Village of Milford, Michigan, Mayfield Village, Ohio, and City of Boulder, Colorado at 25).

CONCLUSION

For the foregoing reasons, the *amici curiae* urge affirmance of the Wisconsin Supreme Court's holding that FIFRA preempts any and all local regulation of pesticides.

Respectfully submitted,

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